Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-32 OF 1994
AUGUSTINE PAUL JC
30 JUNE 1997

Limitation *— Accrual of cause of action — Action against solicitor for breach of contract and negligence — Failure to transfer land — Whether action was for recovery of land or for damages — Computation of time — When does a cause of action in tort and contract arise — Whether action was time-barred — Limitation Act 1953 ss 6(1) & 9(1)*

Civil Procedure *— Pleadings — Striking out — Ground: disclosing no reasonable cause of action — Assertion that action time-barred — Whether time-barred action could be struck out on the sole ground that it disclosed no cause of action — Rules of the High Court 1980 O 18 r 19(1)(a)*

The plaintiff entered into a sale and purchase agreement on 21 January 1984 with the owner of five plots of land ('the land') for the purchase of the same. The defendant, an advocate and solicitor, witnessed the agreement. The balance of the purchase price was settled on 3 March 1984. On 30 November 1984, the plaintiff signed and delivered to the defendant a land transfer form to be handed over to the Registry of Land Titles, District of Alor Gajah to effect the transfer of title. In mid-1985, the plaintiff enquired about the position of the transfer but received no response from the defendant. On 27 March 1991, the owner sold the land to a corporation, the new owner. On 30 March 1991, the plaintiff filed a suit against the defendant praying, inter alia, for specific performance of an oral agreement relating to the transfer of the land and damages.

The defendant pleaded that the plaintiff's claim was barred by limitation and filed an application pursuant to O 18 r 19(1)(a) of the Rules of the High Court 1980 and the inherent jurisdiction of the court to strike out the claim. The senior assistant registrar allowed the claim and the plaintiff appealed. Among the issues before the court were: (i) whether the action was one related to the recovery of land or for damages; (ii) when did the cause of action accrue and whether the action was time-barred; and (iii) whether the defendant was entitled to an order striking out the statement of claim on the sole ground that it disclosed no cause of action as it was time-barred.

Held, allowing the appeal:

(1) The claim for specific performance was against the defendant based on his oral promise and undertaking to effect a transfer to the plaintiff. The defendant was in no position to do so as the new owner had obtained an indefeasible interest in the land. The plaintiff's cause of action was thus a claim for damages at common law and not for recovery of land and the applicable period of limitation was six years as provided by s 6(1) of the Limitation

Act 1953 (see pp 624F–I and 625A–B); *British Mutual Investment Co v Cobbold* (1875) LR 19 Eq 627 followed. A

(2) The infringement in this appeal was the non-registration of the land in favour of the plaintiff. That was the task that the defendant was contractually bound to perform. The duty to register the land in the name of the plaintiff was a continuing one till registration was effected. The damage suffered by the plaintiff would be ascertainable only when it became impossible to register the land in his name — that is to say, in 1991 when it was conveyed to the new owner. It was only at that point of time that the plaintiff could be said to have suffered any damage which is a necessary ingredient for an action founded on tort. That would be the time when all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action had accrued. Prior to that point of time, there would only be prospective loss and not actual damage which is necessary to sustain a claim for economic loss. Accordingly, the plaintiff's cause of action in both contract and tort was not time-barred. They were concurrent in that the cause of action based on contract and tort accrued in 1991. B C D

In the case of the cause of action founded on contract, the duty of the defendant was to effect a valid registration of the transfer. Consequently, the breach occurred only at the moment when this became impossible, that is to say, when the land was sold to the new owner. In the case of the cause of action founded on tort, the cause of action accrued when it was too late to effect the transfer (see p 634C–G); *Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571, *Wardley Australia Ltd v Western Australia* (1992) 109 ALR 247, *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 and *Invercargill City Council v Hamlin* [1996] 1 All ER 756 followed; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 1 All ER 65 not followed. E F G

(3) As the defendant's application was limited to O 18 r 19(1)(a), he was therefore precluded from relying on the inherent jurisdiction of the court for assistance. This is because, although the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19, the High Court has no such jurisdiction if the application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be (see p 636A–C); *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 followed. H I

(4) An action cannot be struck out on the ground that it discloses no cause of action as statutes of limitation merely barred a plaintiff's remedy and not his cause of action. Accordingly, the course adopted by the defendant to strike out the action was wrong in

law (see pp 637E and 638D–G); *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 961, *Yeo Chu Hui v Lim Cheng Jin & Anor* [1993] 1 AMR 745 and *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 followed.

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian jual beli pada 21 Januari 1984 dengan pemilik lima plot tanah ('tanah tersebut') untuk membeli yang sama. Defendan, seorang peguambela dan peguamcara, telah menyaksikan perjanjian. Baki harga beli dijelaskan pada 3 Mac 1984. Pada 30 November 1984, plaintif menandatangani dan menyerahkan kepada defendan suatu borang pindahmilik tanah untuk diserahkan kepada Pendaftar Hakmilik Tanah, Daerah Alor Gajah bagi melaksanakan pemindahan hakmilik. Pada pertengahan tahun 1985, plaintif membuat pertanyaan mengenai taraf pemindahan tetapi tidak menerima sebarang jawapan daripada defendan. Pada 27 Mac 1991, pemilik telah menjual tanah tersebut kepada sebuah perbadanan, iaitu pemilik baru. Pada 30 Mac 1991, plaintif memfailkan suatu guaman terhadap defendan memohon, antara lain, untuk pelaksanaan spesifik perjanjian lisan yang berkaitan dengan pindahmilik tanah tersebut dan ganti rugi.

Defendan memplidkan bahawa tuntutan plaintif dihalang oleh had masa dan memfailkan permohonan menurut A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 dan bidang kuasa sedia ada mahkamah untuk membatalkan tuntutan. Penolong kanan pendaftar membenarkan tuntutan dan plaintif merayu. Di antara isu-isu di hadapan mahkamah ialah: (i) sama ada tindakan berkaitan dengan mendapat kembali tanah atau untuk ganti rugi; (ii) bilakah kausa tindakan terakru dan sama ada tindakan dihalang masa; dan (iii) sama ada defendan berhak mendapat perintah membatalkan pernyataan tuntutan atas alasan tunggal bahawa ia tidak mendedahkan kausa tindakan kerana ia dihalang masa.

Diputuskan, membenarkan rayuan:

(1) Tuntutan untuk pelaksanaan spesifik adalah terhadap defendan berdasarkan janji lisan dan akujanji untuk melaksanakan pindahmilik kepada plaintif. Defendan tidak berada dalam kedudukan untuk berbuat demikian kerana pemilik baru telah memperolehi kepentingan yang tak boleh disangkal dalam tanah tersebut. Kausa tindakan plaintif dengan itu adalah satu tuntutan untuk ganti rugi di common law dan bukan untuk mendapat kembali tanah dan tempoh had masa yang terpakai adalah enam tahun seperti yang diperuntukkan oleh s 6(1) Akta Had Masa 1953 (lihat ms 624F–I dan 625A–B); *British Mutual Investment Co v Cobbold* (1875) LR 19 Eq 627 diikut.

(2) Pelanggaran dalam rayuan ini adalah ketidakdaftaran tanah tersebut yang memihak kepada plaintif. Itulah tugas yang perlu

dilaksanakan secara kontraktual oleh defendan. Kewajipan untuk mendaftar tanah tersebut dalam nama plaintif adalah kewajipan yang berterusan sehingga pendaftaran diberi kesan. Kerosakan yang ditanggung oleh plaintif hanya boleh ditentukan apabila ia menjadi mustahil untuk mendaftar tanah tersebut dalam namanya — iaitu, pada tahun 1991 apabila ia dipindahhak kepada pemilik baru. Hanya pada ketika itu bahawa plaintif boleh dikatakan telah mengalami apa-apa kerugian yang merupakan satu ramuan yang perlu untuk tindakan berdasarkan tort. Ini merupakan masa apabila semua unsur yang perlu untuk menyokong tuntutan plaintif wujud bagi mengatakan bahawa kausa tindakan telah terakru. Sebelum itu, hanya terdapat kehilangan prospektif dan bukan kerosakan sebenar yang perlu untuk mengekalkan tuntutan untuk kerugian ekonomi. Oleh itu, kausa tindakan plaintif untuk tindakan dalam kedua-dua kontrak dan tort tidak dihalang masa. Mereka adalah bersama dalam ertikata bahawa kausa tindakan berdasarkan kontrak dan tort terakru pada tahun 1991.

Dalam kes di mana kausa tindakan adalah berdasarkan kontrak, kewajipan defendan adalah untuk melaksanakan pendaftaran pindahmilik yang sah. Berikutnya, kemungkiran hanya berlaku pada ketika apabila ini menjadi mustahil, yakni, apabila tanah tersebut dijual kepada pemilik baru. Dalam kes di mana kausa tindakan adalah berdasarkan tort, kausa tindakan terakru apabila ia adalah terlalu lewat untuk melaksanakan pindahmilik (lihat ms 634C–G); *Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571, *Wardley Australia Ltd v Western Australia* (1992) 109 ALR 247, *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 dan *Invercargill City Council v Hamlin* [1996] 1 All ER 756 diikut; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 1 All ER 65 tidak diikut.

(3) Oleh kerana permohonan defendan adalah terhad kepada A 18 k 19(1)(a), maka dia dihalang daripada bergantung kepada bidang kuasa sedia ada mahkamah untuk bantuan. Ini adalah kerana, walaupun Mahkamah Tinggi selalu mempunyai bidang kuasa sedia ada untuk menghalang penyalahgunaan proses tanpa mengira sama ada ia diperlukan secara nyata atau tidak dalam satu permohonan di bawah A 18 k 19, Mahkamah Tinggi tidak mempunyai bidang kuasa demikian jika permohonan dihadkan kepada satu-satunya alasan bahawa apa-apa pliding tidak mendedahkan kausa tindakan atau pembelaan yang munasabah mengikut mana-mana yang berkenaan (lihat ms 636A–C); *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 diikut.

(4) Satu tindakan tidak boleh dibatalkan atas alasan bahawa ia tidak mendedahkan kausa tindakan kerana statut had masa cuma menghalang remedi plaintif dan bukan kausa tindakannya. Oleh itu, cara yang diterimapakai oleh defendan untuk membatalkan tindakan adalah salah di sisi undang-undang (lihat ms 637E dan

638D–G); *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 961, *Yeo Chu Hui v Lim Cheng Jin & Anor* [1993] 1 AMR 745 dan *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 diikut.]

[*Editorial Note*: The defendant/respondent has appealed to the Court of Appeal vide Civil Appeal No M–03–44–97.]

Notes

For cases on accrual of cause of action, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1740–1742.

For cases on striking out, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2649–2676.

Cases referred to

Baker v Ollard & Bentley (a firm) (1982) 126 Sol Jo 593 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)

Bell v Peter Browne & Co [1990] 3 All ER 124; [1990] 2 QB 495 (refd)

British Mutual Investment Co v Cobbold (1875) LR 19 Eq 627 (folld)

Cartledge & Ors v E Jopling & Sons Ltd [1963] AC 758 (refd)

Central Trust Co v Rafuse (1986) 31 DLR (4th) 481 (refd)

City of Kamloops v Nielson (1984) 10 DLR (4th) 641 (refd)

Costa v Georghiou [1985] 1 PN 201 (refd)

Costigan v Ruzicka (1984) 13 DLR (4th) 368 (refd)

Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (folld)

Day v Mead (1987) 2 NZLR 443 (refd)

DW Moore & Co Ltd & Ors v Ferrier & Ors [1988] 1 WLR 267 (refd)

First National Commercial Bank plc v Humberts (a firm) [1995] 2 All ER 673 (refd)

Forster v Outred & Co [1982] 1 WLR 86 (refd)

Gibbs v Guild (1881–82) 8 QBD 296 (refd)

Groom v Crocker & Ors [1938] 2 All ER 394 (refd)

Hawkins v Clayton (1988) 164 CLR 539 (refd)

Henderson & Ors v Merrett Syndicates Ltd & Ors [1995] 2 AC 145 (refd)

Hopkins v MacKenzie (1995) 6 Med LR 26 (refd)

Invercargill City Council v Hamlin [1996] 1 All ER 756 (folld)

Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd [1990] 1 All ER 808 (refd)

Islander Trucking Ltd (In liquidation) v Hogg Robinson & Gardner Mountain (Marine) Ltd [1990] 1 All ER 826 (refd)

Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)

Low Yat v GC Grace [1947] MLJ 115 (refd)

Melton v Walker & Stanger (1981) 125 Sol Jo 861 (refd)

Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm) [1978] 3 All ER 571 (folld)

Nasri v Mesah [1971] 1 MLJ 32 (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126 (refd)
Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215 (refd)
Peck v Russell (1923) 4 FMSLR 32 (refd)
Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 1 All ER 65 (not folld)
Ponnusamy & Anor v Nathu Ram [1959] MLJ 86 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (folld)
Read v Brown (1889) 22 QBD 128 (refd)
Reeves v Butcher [1891] 2 QB 509 (refd)
Riches v Director of Public Prosecutions [1973] 2 All ER 935 (refd)
Ronex Properties Ltd v John Laing Construction Ltd & Ors [1982] 3 All ER 961 (folld)
Ross v Caunters [1980] 1 Ch 297 (refd)
Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301 (refd)
Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (folld)
Tengku Jaffar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 (refd)
Tio Chee Hing & Ors v Government of Sabah [1981] 1 MLJ 207 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
UBAF Ltd v European American Banking Corp [1984] 1 QB 713 (refd)
Wardley Australia Ltd v Western Australia (1992) 109 ALR 247 (folld)
Williams v Thomas [1909] 1 Ch 713 (refd)
Yeo Chu Hui v Lim Cheng Jin & Anor [1993] 1 AMR 745 (folld)
Yong & Co v Wee Hood Teck Development Corp [1984] 2 MLJ 39 (refd)
Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors [1985] 2 MLJ 222 (refd)

Legislation referred to

Limitation Act 1953 ss 4, 6(1), 9(1)
National Land Code 1965 s 340(2)
Rules of the High Court 1980 O 18 rr 8(1), 19, 19(1)(a), 19(2), O 33 rr 2, 3(2)

M Manoharan (*Karpal Singh & Co*) for the plaintiff/appellant.
Palanivel Sathasivam (*Mohd Ali & Co*) for the defendant/respondent.

Augustine Paul JC: This appeal concerns the date of accrual of the plaintiff's cause of action for breach of contract and in tort arising out of his solicitor's alleged negligence.

The plaintiff entered into a sale and purchase agreement ('the agreement') with one Inon bte Majid ('the owner') on 21 January 1984 for the purchase of five plots of land comprised in Lot 1840, Mukim Durian Tunggal, Daerah Alor Gajah ('the land'). The agreement was witnessed by

A the defendant, an advocate and solicitor practising under the name and style of Messrs Mohd Ali & Co at No 571, Taman Melaka Raya, Melaka. In accordance with the terms of the agreement, the plaintiff paid the deposit of 10% on 1 December 1983 and the balance on 3 March 1984 totalling RM15,800 to the defendant. On 30 November 1984, the plaintiff signed and delivered to the defendant a land transfer form to be handed B over to the Registrar of Land Titles, District of Alor Gajah, Melaka for effecting the transfer. In mid-1985, the plaintiff asked the defendant several times about the position of the transfer. The defendant did not respond. On 27 March 1991, the owner sold the land to one Dayapromik Sdn Bhd ('the new owner'). On 30 March 1994, the plaintiff filed this C claim against the defendant praying for, inter alia, specific performance of the oral agreement relating to the transfer of the land and damages.

The material parts of the statement of claim read as follows:

Paragraph 6:

D Defendan tersebut seterusnya berjanji dan mengakujanji (selepas ini dirujuk sebagai 'perjanjian bertulis tersebut') sebagai seorang peguamcara untuk melakukan proses pindahmilik plot-plot tanah tersebut daripada tuanpunya tanah tersebut kepada plaintif.

Paragraph 7:

E Sejajar dengan perjanjian lisan tersebut, plaintif telah pada 30 November 1984 menandatangani dan menyerahkan kepada defendan borang pindahmilik tanah untuk diserahkan kepada Pendaftar Hakmilik Geran Tanah, Daerah Alor Gajah, Melaka untuk proses memindah hakmilik.

Paragraph 9:

F Dalam memungkiri perjanjian lisan tersebut defendan tersebut telah gagal, cuai dan enggan untuk memindah hakmilik plot-plot tanah tersebut kepada plaintif dan telah menyebabkan tuan punya tanah tersebut menjual plot-plot tanah tersebut kepada pihak Dayapromik Sdn Bhd sebuah firma pada 27 Mac 1991.

Butir-butir Kecuaian

G 1 Gagal untuk mengambil tandatangan serentak semua pembeli lain plot-plot tanah tersebut dalam Borang 14A untuk menyempurnakan perjanjian bertulis tersebut.

2 Gagal untuk menasihati pembeli-pembeli hak untuk memasukkan suatu kaveat persendirian setelah menyempurnakan perjanjian bertulis tersebut.

H 3 Gagal untuk memberitahu pembeli-pembeli amnya dan plaintif khasnya perkara-perkara yang berikutan dalam penyempurnaan perjanjian bertulis tersebut dan Borang 14A.

4 Gagal untuk melindungi kepentingan plaintif walaupun telah diminta berbuat demikian beberapa kali untuk plot-plot tanah tersebut dipindahmilik kepada nama plaintif.

I 5 Gagal untuk menghantar atau mendaftarkan dokumen-dokumen perserahan pindahmilik berkaitan dengan perjanjian bertulis tersebut dan atas plot-plot tanah tersebut di Pejabat Pengarah Tanah dan Galian, Melaka.

6 Gagal untuk menghantar atau mendaftarkan dokumen perserahan pindahmilik berkaitan dengan perjanjian tersebut dan atas plot-plot tanah tersebut di Pejabat Pengarah Tanah dan Galian, Melaka dalam suatu jangkamasa yang munasabah.

Paragraph 10:

Akibat daripada kecuaian defendan, plaintif telah mengalami kerugian, kehilangan dan ganti rugi.

Paragraph 11:

Maka plaintif memohon suatu penghakiman terhadap defendan untuk:

(1) pelaksanaan spesifik perjanjian lisan tersebut;

(2) ganti rugi dalam alternatif;

(3) faedah;

(4) kos; dan

(5) apa-apa atau relief selanjutnya yang difikir patut dan perlu oleh Mahkamah Yang Mulia ini.

In his statement of defence, the defendant pleaded, inter alia, that the plaintiff's claim was barred by limitation. On 25 May 1995, the defendant filed an application to strike out the statement of claim pursuant to O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC') and the inherent jurisdiction of the court.

The learned senior assistant registrar ('the SAR') who heard the application allowed it with costs on 28 June 1996. The matter is now before me by way of an appeal against the order made by the SAR.

Before me, learned counsel for the plaintiff/appellant contended that the relevant period of limitation in this case should be 12 years as the case involves recovery of land. Learned counsel for the defendant/respondent contended that the case is one that relates to a contract between the parties and accordingly, the relevant period of limitation is six years. Both parties took a different view on para 9 of the statement of claim. Learned counsel for the plaintiff contended that it is worded to make out a claim in tort while learned counsel for the defendant contended that the paragraph is not a claim in tort as it refers to a breach of contract. I then drew the attention of both parties to the cases of *Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571 and *Bell v Peter Browne & Co* [1990] 3 All ER 124 which did not follow the former on the manner of computing the limitation period in cases of this nature. At an adjourned hearing, learned counsel for the plaintiff said that the judgment in *Midland Bank Trust Co Ltd* represents the correct law while learned counsel for the defendant referred to *Costigan v Ruzicka* (1984) 13 DLR (4th) 368 where the Alberta Court of Appeal also declined to follow *Midland Bank Trust Co Ltd.*

With regard to the liability of a solicitor for negligence, it is now accepted that it can be founded both in contract and in tort. Oliver J reviewed the authorities on the concurrent liability of a solicitor to his client in *Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm)*

and concluded that solicitors are liable in tort as well as in contract to their clients. This view was adopted in *Ross v Caunters* [1980] 1 Ch 297; *Forster v Outred & Co* [1982] 1 WLR 86; *Costa v Georghiou* [1985] 1 PN 201; *DW Moore & Co Ltd & Ors v Ferrier & Ors* [1988] 1 WLR 267; *Bell v Peter Browne & Co* and *Henderson & Ors v Merrett Syndicates Ltd & Ors* [1995] 2 AC 145. In the Commonwealth countries, there has also been a trend towards holding solicitors liable to their clients both in contract and tort. See, for example, *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481; *Hawkins v Clayton* (1988) 164 CLR 539 and *Day v Mead* (1987) 2 NZLR 443. In Malaysia, a solicitor's concurrent liability in contract and tort was recognized by the Federal Court in *Yong & Co v Wee Hood Teck Development Corp* [1984] 2 MLJ 39 where Syed Agil Barakbah FJ said at p 45:

> The liability of a solicitor may be viewed in two aspects. At common law, the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort.

See also *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126.

The first matter for consideration, as contended by learned counsel for the plaintiff, is whether this case relates to the recovery of land so that the period of limitation shall be 12 years as provided by s 9(1) of the Limitation Act 1953. The Limitation Act 1953 shall hereafter be referred to as 'the Act'. Section 9(1) of the Act reads as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

If the plaintiff's action falls under this section, then it would not be time-barred at whatever date the cause of action is deemed to have accrued as the time lapse between the date of the agreement and the date of filing this action is only about 10 years. The section makes it clear that it applies to an action '... to recover any land ...'. This would be so even if the action to recover land is founded on a contract as s 6(1) of the Act — which deals with, inter alia, the limitation period for actions founded on contract — excludes from its ambit such contracts by the use of the words 'save as hereinafter provided ...' in the section. Section 9(1) is such a provision to render s 6(1) inapplicable to actions to recover land founded on contract. The application of s 9(1) of the Act was considered by the Court of Appeal in *Ponnusamy & Anor v Nathu Ram* [1959] MLJ 86 where Thomson CJ (as he then was) said at p 88:

> As I put it colloquially this morning in the course of discussion with counsel, what the plaintiffs are doing is this. They are coming to the court and saying 'we are entitled to this land and we want this land'. And if the court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the

> consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of s 9 of the Limitation Ordinance (No 4 of 1953).
>
> Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract, the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By s 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

In so saying, the Court of Appeal followed *Williams v Thomas* [1909] 1 Ch 713 where Buckley LJ said at p 730:

> It has been argued, and, I think, successfully, that while on the one hand the expression 'to recover any land' in s 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means 'obtain any land by judgment of the court' ... .

In *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court adopted the judgment in *Ponnusamy* and added that whether an action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land so that the period of limitation would be 12 years in either case.

In the light of the law that I have adverted to, I shall now consider whether this case involves an action for the recovery of land. I can say without any hesitation that it would be so if the person sued is the owner of the land based on the agreement. However, the claim for specific performance is against the solicitor as defendant based on his oral promise and undertaking to effect the transfer of the land from the owner to the plaintiff. The defendant would be in no position to do so as the new owner would have obtained an indefeasible interest in the land. Section 340(2) of the National Land Code 1965 enumerates the instances when a title to land shall be rendered defeasible and the plaintiff's action has not been tailored for such relief. The plaintiff 's prayer for specific performance of the defendant's undertaking to him cannot therefore be sustained. I must add that a mere prayer for specific performance of a contract without sufficient material to render it a contract for the recovery of land cannot make it one. An award of damages is the principal remedy and in most cases the only remedy which the court will grant for breach of duty by a solicitor. In *British Mutual Investment Co v Cobbold* (1875) LR 19 Eq 627, a solicitor acting for clients lending money upon a mortgage failed to spot a defect in the borrower's title to the mortgaged property. Upon the borrower's bankruptcy, the client filed a bill in equity seeking a declaration that the solicitor was liable to make good the loss which they had sustained and take the property off their hands. It was held that their claim was misconceived as the client's remedy was to claim for damages at common law. The plaintiff 's cause of action against the defendant is therefore the

A alternative prayer for damages. In the result, it is my opinion that there is no cause of action against the defendant for the recovery of the land. The question of limitation therefore does not arise for consideration.

The proper claim of the plaintiff against the defendant being damages, the applicable rule of limitation is s 6(1) of the Act which reads as follows:

B

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort; ... .

This section applies to actions founded on contract or tort and the period C of limitation is six years from the date on which the cause of action accrued. It is settled law that in the case of actions founded on contract, time runs from the date of breach (see *Gibbs v Guild* (1881) 8 QBD 296; *Nasri v Mesah* and *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301). In claims based on tort, the cause of action accrues when the D plaintiff suffers damage (see *Cartledge & Ors v E Jopling & Sons Ltd* [1963] AC 758). In view of the lapse of a period of about ten years from the time the plaintiff entered into the agreement with the owner in 1984 till this action was filed in 1994, it is therefore critical to determine the point of time at which the cause of action accrued in favour of the plaintiff in order to determine whether the action is time-barred.

E I pause for a moment to determine the meaning of the phrase 'cause of action' which is important in the law of limitation as the period of limitation runs from the time the cause of action accrues. A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in F order to obtain judgment (see *Read v Brown* (1889) 22 QBD 128). In *Reeves v Butcher* [1891] 2 QB 509 — followed by the Federal Court in *Nasri v Mesah* — Lindley LJ said at p 511:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 519, decided G in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

In *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, Hashim Yeop A Sani CJ (Malaya) — in delivering the judgment of the (then) Supreme H Court — referred to *Lim Kean v Choo Koon* [1970] 1 MLJ 158 and the authorities cited in that case and agreed that a cause of action accrues when:

(i) there is in existence a person who can sue and another who can be sued; and

I (ii) when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

As Choong Yeow Choy says in his well-researched book entitled *Law of Limitation* (Butterworths Asia, 1995) at p 44:

> The point in time where all the material facts are said to be in existence are of utmost importance and this question usually gives rise to serious contention between parties to the proceedings ... .

It therefore becomes necessary for me to consider the point of time at which the cause of action accrued in respect of the plaintiff's claim based on contract and on tort. Paragraph 6 of the statement of claim discloses that there was a retainer of the defendant as solicitor for the plaintiff. Pursuant to this retainer, a contract came into existence whereby the defendant undertook to transfer the land from the owner to the plaintiff. Pursuant to this contract, the plaintiff handed over the signed transfer forms to the defendant for necessary action. There was therefore a retainer which brought into force the normal terms of the contractual relationship and, in particular, the duty of the defendant as solicitor to protect the interests of the plaintiff as his client in matters to which the retainer relates by all proper means (see *Groom v Crocker & Ors* [1938] 2 All ER 394). The duty of the defendant, pending registration of the document of title in favour of the plaintiff, was to lodge a caveat (see *Yong & Co v Wee Hood Teck Development Corp*). The statement of claim alleges that as a result of the defendant's failure to take the necessary steps, the land was registered in the name of the new owner. There was therefore a breach of contract on the part of the defendant. The alleged negligent acts of the defendant have been pleaded in para 9 of the statement of claim. This is not a case of a solicitor giving wrong and negligent advice, where the cause of action will accrue at a fixed point of time, but of simple non-feasance. In my view, the starting point for ascertaining the date of accrual of the cause of action is the judgment of Oliver J in *Midland Bank Trust Co Ltd & Anor v Hett Stubbs & Kemp (a firm)*. In that case, the plaintiffs were the executors of a client of the defendant firm. In March 1961, the defendants' senior partner had been instructed to draw up an option agreement for the purchase by the client of his father's farm at a favourable price. The option was to remain effective for ten years. The client paid a nominal consideration for the option, which the defendants failed to register as an estate contract under the Land Charges Act 1925. On a number of occasions, the client consulted the defendants and sought their advice as to whether he should exercise the option. In August 1967, the client's father — wishing to resile from the option he had granted his son — discovered through other solicitors that the option had not been registered and conveyed the farm to his wife for the sum of £500 within the ten-year period. In October 1967, the client sought without success to exercise the option. In July 1972, he issued proceedings against the defendants, claiming damages for negligence and breach of duty. The defendants contended that the action was time-barred. Oliver J held that the defendants were liable in tort for breach of duty because the damage suffered by their client did not arise until his father conveyed the farm to his wife, thereby defeating the option. The client's cause of action therefore arose within the limitation period. He also held that the defendants' breach of their contractual duty amounted to non-feasance of the duty to register the option, and that that duty continued to bind them until it ceased to be effectively capable of performance when the father conveyed the farm to his wife. Thus, an

action based in contract against the defendants was not statute-barred. In the course of his judgment, Oliver J said at pp 611–612:

> So far as the client is concerned, it is a matter of total indifference to him at what date the solicitor chooses to fulfil his contractual obligation under (2) above so long as it is effectively fulfilled. No doubt a normally careful practitioner would fulfil that obligation as soon as is reasonably practicable. In an appropriate case, he might give a priority notice. But if he fails to do so and an effective registration can still be and is effected, his client can have no complaint except the purely technical one that he has been a bit careless and might have done it sooner. He has, no doubt, exhibited a failure to show the normal competence and care for his client's affairs by carelessly allowing a period to elapse during which a third party might have, but has not in fact, acquired an interest. But such a failure cannot, I should have thought, affect, much less discharge, the primary obligation to effect registration timeously, which continues until it is performed or becomes impossible of performance or until the client elects to treat the continued non-performance as a repudiation of the contract.
>
> Suppose that Mr Aymere Stubbs had woken up to the fact that he had failed to register the option in, say, May 1961 and had then registered it. And suppose that, four years later, Geoffrey had caused a search to be made and had discovered that the charge had not been registered until two months after the date of the option? Could Geoffrey have successfully sued the firm for breach of contract on alleging those facts? Counsel for the defendants says Yes. There would, he says, have been a technical cause of action for breach of the duty to exercise reasonable care and skill which would have entitled Geoffrey to nominal damages. I think that the action would have been struck out as an abuse of the process of the court.

Midland Bank Trust Co Ltd's case was considered in *Bell v Peter Browne & Co*. In that case, the plaintiff had employed the defendant solicitors to act on his behalf in divorce proceedings. It had been agreed between the plaintiff and his wife that the matrimonial home, which was in their joint names, would be transferred into the sole name of the wife. The plaintiff's interest was to be protected by the defendants through the execution of a trust deed or mortgage. Subsequently, the house was transferred to the wife but the defendants failed to take any steps to protect the plaintiff's interest. Eight years later, the wife sold the property and spent the proceeds. In an action for damages for breach of contract and negligence, the defendants pleaded limitation. In distinguishing *Midland Bank Trust Co Ltd*'s case, the Court of Appeal held that the plaintiff suffered damage when he parted with his legal estate in the property by conveyance to his wife. At that moment, the plaintiff acquired an interest in the proceeds of sale which, if left unprotected, was clearly of less value to him. The court rejected the plaintiff's argument that the damage did not occur until his wife sold the property. The sale after eight years had the effect of making the breach and its consequences irremediable. It did not alter the fact that damage was suffered at the time of the conveyance. *Midland Bank Trust Co Ltd*'s case also did not find favour with the Alberta Court of Appeal in *Costigan v Ruzicka*. In that case, the plaintiff sold his farm to a timber company in 1962 under an arrangement whereby he retained the right for life to graze livestock on all but a few acres of the land. The defendant

solicitor was instructed to act on both sides of the transaction and failed to register documents protecting the plaintiff's interest. The plaintiff was later barred from grazing animals by a subsequent purchaser of the farm. The plaintiff then became aware of the solicitor's failure to register his rights. It was held that the cause of action in contract commenced to run a reasonable time after the task had been undertaken which would not be later than the day the file was closed. Accordingly, the limitation in contract had expired some time in 1968. In tort, the limitation period commenced to run from the time damage occurs; and in determining when damage occurs, the court should avoid an ad hoc approach. Accordingly, the appropriate rule is that an action in tort commences from the time damage occurs whether or not it was discoverable by reasonable diligence, following *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 1 All ER 65. It was held that damage occurred when the plaintiff did not obtain an interest in land protected by the registration of a caveat protecting his grazing rights. Thus, the cause of action accrued, whether in contract or in tort, in 1962 when the defendant failed to register documents protecting the plaintiff's rights. My immediate response is that *Pirelli* — which was followed in *Costigan* — was not followed by the Supreme Court of Canada in *City of Kamloops v Nielson* (1984) 10 DLR (4th) 641, thereby weakening the former.

The court in both *Bell* and *Costigan* followed *Forster v Outred & Co* where the plaintiff signed a mortgage deed charging her property to H, as security for a loan by H to her son. She claimed that she had done so as a result of the defendant solicitor's negligence. It was held that the plaintiff's loss accrued when she signed the mortgage deed and not at a later date when the demand for payment was made under the deed and, therefore, the claim was statute-barred. Stephenson LJ said in his judgment at p 98:

> ... the plaintiff has suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to encumber her interest in her freehold estate with this legal charge and subject her to a liability which may, according to matters completely outside her control, mature into financial loss — as indeed it did. It seems to me that the plaintiff did suffer actual damage in those ways; and subject to that liability and with that encumbrance on the mortgage property was then entitled to claim damages ... .

Dunn LJ in his concurring judgment said at p 99:

> I would hold that in cases of financial or economic loss the damage crystallizes and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment.

The same approach was adopted by the Court of Appeal in *Baker v Ollard & Bentley (a firm)* (1982) 126 Sol Jo 593, where it was held that the alleged cause of action accrued on the date when property was conveyed to the plaintiff, and not at a later date when problems arose; *Costa v Georghiou* where it was held that the cause of action accrued when the plaintiff entered into a sub-underlease with defective rent review clause, and not nine years later when the rent review clause was intended to

operate and *Melton v Walker & Stanger* (1981) 125 Sol Jo 861, where it was held that the alleged cause of action accrued when the plaintiff executed the agreement drafted by the defendant solicitors, and not at a later date when the High Court held that the agreement did not have the effect intended by the plaintiff. In *DW Moore & Co Ltd v Ferrier*, the Court of Appeal adopted a very similar approach to that in *Forster*. *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808 involved a claim against brokers for obtaining reinsurance contracts which proved to be viodable. It was held that the cause of action in tort accrued where the reinsurance contracts were executed, not when the reinsurers sought to avoid them. In *Islander Trucking Ltd (In liquidation) v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826, brokers arranged 'goods in transit' insurance for the plaintiff in 1980. In 1985, the insurers avoided the policy for alleged non-disclosure and misrepresentation. It was held that the cause of action in tort accrued when the insurance contract was made, not when the insurers avoided. A different approach was adopted in *UBAF Ltd v European American Banking Corp* [1984] 1 QB 713. The plaintiffs claimed that in December 1974, they had agreed to participate in two loans to shipping companies in reliance on incorrect information supplied by the defendants, and that in March 1976 the shipping companies had defaulted. The writ was issued in December 1981. The Court of Appeal declined to strike out the action on the ground that it was time-barred. Ackner LJ said at p 725:

> The defendants successfully contended before Leggatt J that the accrual of the cause of action occurred when the plaintiffs parted with their money and acquired instead claims for repayment of money lent against borrowers, whose ability to repay was, contrary to the alleged representations, a matter of considerable doubt. Again, there is a short answer to this question — it depends upon the facts as found at the trial. The plaintiffs do not assert that they are entitled to damages to be measured by the difference in the value of the chose in action which they acquired by making this loan as compared with the value it would have had if the representations had been accurate, as in a claim for a breach of warranty. Their case is that, if they had known the respects in which the representations were inaccurate, they would not have entered into the contract. Accordingly, it is argued by the defendants that, at the very moment of entering into that contract, the plaintiffs must have suffered damage. In our judgment, this bare proposition is not self-evident. The plaintiffs are suing in tort — the tort of negligence. To establish a cause of action they must establish not only a breach of duty, but that that breach of duty occasioned them damage. This is axiomatic. It is possible, although it may be improbable, that, at the date when the plaintiffs advanced their money, the value of the chose in action which they then acquired was, in fact, not less than the sum which the plaintiffs lent, or indeed even exceeded it.

Cases such as *Forster* and *Bell* were reviewed by the High Court of Australia in *Wardley Australia Ltd v Western Australia* (1992) 109 ALR 247. In that case, the plaintiff gave an indemnity in 1987 in reliance on representations made by the defendants. In 1989, the plaintiff was called upon to make payment pursuant to the indemnity in 1987 in reliance on representations

made by the defendants. In 1991, the plaintiff sought to amend its statement of claim by adding a statutory claim (for which there was a three-year limitation period) to the effect that it had been induced to give the indemnity by the defendant's misleading representations. The High Court held that the plaintiff suffered loss when it was called upon to pay, not when it entered into the indemnity agreement. Mason CJ, Dawson, Gaudron and McHugh JJ — in referring to *Melton v Walker & Stanger*; *Baker v Ollard & Bentley (a firm)*; *DW Moore & Co Ltd v Ferrier*; *Islander Trucking Ltd (In liquidation) v Hogg Robinson & Gardner Mountain (Marine) Ltd* and *Bell v Peter Browne & Co* [1990] 2 QB 495 — said at pp 254–255:

> Economic loss may take a variety of forms and, as Gaudron J noted in *Hawkins v Clayton* (1988) 164 CLR 539, the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other forms of damage, there has to be some actual damage. Prospective loss is not enough.
>
> When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of 'loss or damage'. And that is just as well. In many instances, the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of under-compensation or overcompensation, the risk of the former being the greater.
>
> In *UBAF Ltd v European American Banking Corp* [1984] 1 QB 713, Ackner LJ said:
>
> > 'The mere fact that the innocent but negligent misrepresentations caused the plaintiffs to enter into a contract which they otherwise would not have entered into, does not inevitably mean that they had suffered damage by merely entering into the contract.'
>
> That is because it was not self-evident that the value of the chose in action which the plaintiff acquired, the right to repayment of a loan, was worth less than the amount paid to the borrower at the time of entry into the loan agreement. Evidence was required to establish that fact, if it were a fact.

And at p 257:

> Be that as it may, the English decisions have proceeded according to the view that, where the plaintiff is induced by a negligent misrepresentation to

A enter into a contract and the contract, as a result of the negligence, yields property or contractual rights of lesser value, the plaintiff first suffers financial loss on entry into the contract, notwithstanding that the full extent of the plaintiff's financial loss may be incapable of ascertainment until some later date. In part, the English approach appears to have been influenced by the general principle stated in *Darley Main Colliery Co v Mitchell* (1886) B 11 App Cas 127 that damages in respect of a cause of action are awarded on a once and for all basis. But that principle tells us very little, if anything, about the time when the plaintiff first suffers loss or damage in the circumstances of a particular case, except that, properly understood, *Darley Main Colliery* emphasises the need for actual, as distinct from prospective, damage before prospective damages can be included in the award.

C And further at pp 258–259:

If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first D suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred. A deferred liability may stand in a different position but there is no occasion here to discuss that matter.

E In the result, we agree with the decision of Von Doussa J in *SWF Hoists and Industrial Equipment Pty v State Government Insurance Commission*. There the insured sued the insurer for loss suffered as a result of a misrepresentation as to the extent of the indemnity or liability coverage provided by a proposed contract of insurance. His Honour held that actionable actual loss (as opposed to a mere potential for loss) occurred only when the insured was F called on by a third party to make payments against which it would have been entitled to be indemnified by the insurer under the contract as represented. When the events entitling the third party to make the demand for payment occurred and when the insurer indicated, prior to the making of that demand, that it would not indemnify the insured against any such demand, there was no more than a potential for loss. *SWF Hoists* and *Zoneff* G *v Elcom Credit Union Ltd* are to be distinguished from the English insurance cases *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* and *Islander Trucking Ltd* in that the policies of insurance in the Australian cases were worth what was paid to them.

The conclusion which we have reached with respect of the time when the plaintiff first suffers loss in respect of contingent loss or liability accords H with the comment of Gaudron J in *Hawkins v Clayton*:

> 'If the interest infringed is an interest in recouping moneys advanced, it may be appropriate to fix the time of accrual of the cause of action when recoupment becomes impossible rather than at the time when the antecedent right to recoup should have come into existence, *for the actual loss is sustained only when recoupment becomes impossible.*' (Emphasis I added.)

Gaudron J went on to point out: 'It would be too simplistic to restrict analysis of economic loss merely to a consideration or reduced value or increased liability'.

> The conclusion which we have reached is reinforced by the general considerations to which we referred earlier. It is unjust and unreasonable to expect the plaintiff to commence proceedings before the contingency is fulfilled. If an action is commenced before that date, it will fail if the events so transpire that it becomes clear that no loss is, or will be incurred. Moreover, the plaintiff will run the risk that damages will be estimated on a contingency basis, in which event the compensation awarded may not fully compensate the plaintiff for the loss ultimately suffered. These practical consequences which would follow from an adoption of the view for which the appellants contend outweigh the strength of the argument that the principle applicable to the cases in which the plaintiff acquires property (or a chose in action) should be extended to cases where an agreement subjects the plaintiff to a contingent loss. In such cases, it is fair and sensible to say that the plaintiff does not incur loss until the contingency is fulfilled.

Even in England, recent decisions show that the judicial trend is to restrict the apparently broad principle laid down in the *Forster* line of cases. In *Hopkins v MacKenzie* (1995) 6 Med LR 26 as a result, allegedly, of negligence by the defendant solicitor, the plaintiff's claim against a hospital for medical negligence had been struck out for want of prosecution. The Court of Appeal held that the cause of action in tort against the solicitor accrued when the original claim was actually struck out, and not at any earlier date. The court rejected the submission that the cause of action accrued when the solicitor's delay was such that the original claim would inevitably be struck out. In *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673, the plaintiff loaned £2.6m to a developer in July 1983 on the basis of security valued by the defendant at £4.4m. Sometime later, the developers became insolvent and the security proved insufficient. The plaintiff issued its writ in March 1990, contending that the defendants' valuation was negligent; that a proper valuation would have been £2.7m; and that properly advised, the plaintiff would have made no loan. On the trial of a preliminary issue, the judge held that the action was statute-barred but the Court of Appeal reversed that decision. The court reasoned that at the time the plaintiff made the advance, it suffered no loss because the security was sufficient. The security remained sufficient to cover all sums due to the plaintiff up to March 1984. Therefore, the plaintiff did not suffer any loss before March 1984. Saville LJ said at p 679:

> At the hearing and in the judgment, much reliance was placed on the cases where the claimant entered into a transaction which through a breach of duty owed to the claimant provided the claimant with less rights than should have been secured, or imposed liabilities or obligations on the claimant which should not have been imposed. Examples of these cases are: *Forster v Outred & Co (a firm)* [1982] 2 All ER 753; [1982] 1 WLR 86, *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808 and *Bell v Peter Browne & Co (a firm)* [1990] 3 All ER 124; [1990] 2 QB 495. In all those cases, however, the court was able to conclude that the transaction then and there caused the claimant loss, on the basis that if the injured party had been put in the position he would have occupied but for the breach of duty, the transaction in question would have provided greater rights, or imposed lesser liabilities or obligations than was the case; and that

A the difference between these two states of affairs could be quantified in money terms at the date of the transaction. By contrast, in the present case, as in *UBAF Ltd v European American Banking Corp* [1984] 2 All ER 226; [1984] 1 QB 713 (and indeed *Wardley Australia Ltd v State of Western Australia* (1992) 109 ALR 247) it seems to me that whichever of the legally recognized kinds of loss is examined, it is impossible on the material B available to conclude that the plaintiffs suffered such loss at any time more than six years from the date of their writ. For the reasons given, it has not been shown that they lost the amount of their advances at that time, or incurred expenses in respect of which they were out of pocket at that time; or at that time lost other transactions or the opportunity to make other transactions of a value greater than the deal they made.

C Neill LJ said at p 680:

> As was recognized by the High Court of Australia in *Wardley Australia v State of Western Australia* (1992) 109 ALR 247 at p 254, economic loss may take a variety of forms, and the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration D of the precise interest infringed by the negligent act or omission. It may also require consideration of the nature of the interference to which the interest is subjected. Some of the cases to which we were referred in the course of argument, however, demonstrate that the courts have been driven to draw narrow, and some would say unconvincing, distinctions between transactions where it has been held that the loss was measurable when the relevant E transaction was entered into and transactions where it has been held that the loss occasioned by the unsatisfactory bargain lay in the future.

Finally, I refer to *Invercargill City Council v Hamlin* [1996] 1 All ER 756 — an appeal from New Zealand — where the Privy Council in declining to follow *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* said F at pp 772–773:

> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. G Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 3 All ER 801; [1995] 3 WLR 118.
>
> H This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of *Pirelli* by the Supreme Court of Canada in the *Kamloops* case. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building, the element of loss or damage which is necessary to I support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the judge applied the right test in law.

> Their Lordships repeat that their advice on the limitation point is confined to the problem created by latent defects in buildings. They abstain, as did Cooke P, from considering whether the 'reasonable discoverability' test should be of more general application in the law of tort.

In my opinion, the rejection of *Midland Bank Trust Co Ltd* in *Bell* must be viewed in the light of the statement of the law in *Wardley* where it was held that the answer to the question when a cause of action for negligence causing economic loss accrues, as in this appeal, requires a consideration of the precise interest infringed by the negligent act or omission. With economic loss, as with other forms of damage, there has to be actual damage. Prospective loss is not enough. The infringement in the appeal before me is the non-registration of the land in favour of the plaintiff. That was the task that the defendant was contractually bound to perform. The duty to register the land in the name of the plaintiff was a continuing one till registration was effected. The damage suffered by the plaintiff will be ascertainable only when it becomes impossible to register the land in his name — that is to say, in 1991 when it was conveyed to the new owner. It is only at that point of time that the plaintiff can be said to have suffered any damage which is a necessary ingredient for an action founded on tort. That would be the time when all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action has accrued (see *Credit Corp (M) Bhd v Fong Tak Sin* and *Invercargill City Council v Hamlin*). Prior to that point of time, there will only be prospective loss and not actual damage which is necessary to sustain a claim for economic loss. To equate actual damage with reduced value and prospective liability is, to my mind, artificial and unrealistic. I would therefore, and with respect, adopt the reasoning in *Midland Bank Trust Co Ltd* and *Wardley*. Accordingly, it is my view that the plaintiff's cause of action in both contract and tort is not time-barred. They are concurrent in that the cause of action based on contract and tort accrued in 1991. In the case of the cause of action founded on contract, the duty of the defendant was to effect a valid registration of the transfer. Consequently, the breach occurred only at the moment when this became impossible, that is to say, when the land was sold to the new owner. In the case of the cause of action founded on tort, the cause of action accrued when it was too late to effect the transfer. That would be the time when the plaintiff suffered actual damage. I refrain from making a finding on whether the plaintiff has pleaded a cause of action in tort as that may pre-judge the issues to be determined at the trial.

Notwithstanding what I have said thus far, I shall now consider whether the procedure adopted by the defendant in seeking to have the action dismissed on the ground that it is time-barred is in accordance with law. As provided by s 4 of the Act:

> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

Order 18 r 8(1) of the RHC requires '... any relevant statute of limitation ...' to be pleaded if such a defence is to be relied on. Paragraph 11 of the statement of defence where the defendant has pleaded limitation reads as follows:

> Secara tambahan dan atau alternatif tuntutan plaintif dihalang oleh had masa di sisi undang-undang dan dari segi ekuiti (laches).

The defendant's application to have the action dismissed is based on O 18 r 19(1)(a) of the RHC and the inherent jurisdiction of the court. Order 18 r 19 reads as follows:

> 19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

The power of the court to dismiss an action summarily is a drastic one (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 and *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156). Thus the court will strike out a statement of claim only in plain and obvious cases and where the claim is obviously unsustainable on the face of it (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36). Accordingly, if an action involves a point of law which requires serious argument, it is not appropriate to strike it out (see *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215). In such circumstances, the point could be set down for argument (see *Low Yat v GC Grace* [1947] MLJ 115) as a preliminary issue under O 33 rr 2, 3(2). As the application in this case is grounded on O 18 r 19(1)(a), certain rules peculiar to that rule must be observed. As provided by r 19(2), no evidence is admissible on an application to strike out on the ground that the pleading discloses no reasonable cause of action or defence (see *Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors* [1985] 2 MLJ 222). It follows that the affidavit accompanying the application of the defendant cannot be read. Thus the court only considers the pleading sought to be struck out and the facts in deciding whether a prima facie cause of action has been made out (see *Peck v Russell* (1923) 4 FMSLR 32). This cannot be done by a minute examination of the documents and facts (see *Bandar Builder Sdn Bhd & Ors v United*

Malayan Banking Corp Bhd). Since the defendant has invoked the inherent jurisdiction of the court, it is pertinent to refer to *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 where Peh Swee Chin SCJ (now FCJ) in writing for the (then) Supreme Court said at pp 23–24:

> It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

As the defendant's application is limited to O 18 r 19(1)(a), he is therefore precluded from relying on the inherent jurisdiction of the court for assistance.

Thus what now remains for consideration is whether the defendant is entitled to an order striking out the statement of claim on the sole ground that it discloses no cause of action as it is time-barred. A cursory reading of the Federal Court judgment in *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 may give an answer in the affirmative. In that case, Chang Min Tat FJ in delivering the judgment of the court said at p 209:

> The arguments for and against the summons have not been incorporated in the record but the learned judge agreed with the Government. He delivered an admirable judgment which we do not pretend we can better and which we therefore reproduce:
>
> 'The breach alleged by the plaintiffs, if there was such a contract, had occurred more than six years ago. The plaintiffs in their affidavit in opposition made by Tio Chee Hing say to the effect that the Limitation Ordinance does not apply to their case because they were only aware that they could sue the present State Government in 1977 and because the agent of the defendants had as late as 25 November 1978, demanded payment of quit rents. These, in my opinion, are not facts which would make the Limitation Ordinance inapplicable to the plaintiff's action.
>
> It was a settled rule of practice in England that a party relying upon the statutes of limitation must plead it as a defence specifically. The defence was not available, and it was no part of the duty of the court to take notice of the statutes of limitation, unless it was specifically pleaded. On the authorities such as *Murray v Secretary of State for India* English & Empire Digest vol II para 375 and *Dismore v Milton* [1938] 3 All ER 762, it was not possible for the defendant to apply under O 25 r 4 of the Rules of the Supreme Court to have the claim struck out where it appeared from the statement of claim that the plaintiffs' cause of action arose at a time before the period prescribed by the statute of limitations. The practice was that the defendant had to deliver a defence pleading the statute of limitations as a defence specifically. It was then for the plaintiffs to show that the statute was inapplicable. This would be followed by a summons for directions for an issue to be tried.
>
> We have, I think, followed this practice in this country.
>
> Recently, the Court of Appeal in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 considered that the observation in *Dismore v*

Milton went too far. It held, not following *Dismore*'s case, that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship Davies LJ in his judgment at p 939 said:

> "In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail." '

With respect we entirely agree.

Riches v Director of Public Prosecutions [1973] 2 All ER 935 — which the Federal Court followed — was explained by the English Court of Appeal in *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 961. In *Ronex*, the court first held that an action cannot be struck out on the ground that it discloses no cause of action as statutes of limitation merely barred a plaintiff's remedy and not his cause of action. The court then explained that in *Riches*, the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. In expressing these views, Donaldson LJ said at pp 965–966:

> Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action and there are some provisions of foreign law which can have that effect, it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply. Concealed fraud has, we are told, been pleaded by the plaintiffs in this case as against the defendants, but whether the personal representatives will or can adopt a similar attitude *vis-à-vis* the third parties can only really emerge if ever they get to the stage of delivering a reply in the third party proceedings. Accordingly, authority apart, I would have unhesitatingly dismissed the application to strike out on this ground. The answer might well have been different if the third parties had relied on any ground other than failure to disclose a reasonable cause of action, but in that event all concerned could have adduced evidence and we would have been able to explore the factual basis on which it is said the Limitation Acts do or, as the case may be do not, apply.
>
> The matter is not in fact free from authority. It was considered in *Riches v DPP* [1973] 2 All ER 935; [1973] 1 WLR 1019, in which the earlier cases

> are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out. Of the cases referred to, it seems that only in *Dismore v Milton* [1938] 3 All ER 762 was an attempt made to strike out solely on the grounds that the Limitation Acts applied and accordingly no cause of action was disclosed. Greer and Slesser LJJ held that such an application must fail for the reasons which I have already indicated and contrasted the effect of the statute of limitations with that of the real property limitation Acts. That being a two-judge court, we are not strictly bound by its decision, but I have no doubt that it was right. Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. *But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.* (Emphasis added.)

It is therefore clear that an action cannot be struck out solely on the ground that it does not disclose a cause of action as it is time-barred. I interpolate to add that what I have just said does not conflict with *Tio Chee Hing* as the application there was not confined to an order to strike out the action on the ground that it disclosed no cause of action based on limitation. As Chang Min Tat FJ said at p 209:

> The response on the part of the Government of Sabah was, without entering an appearance (so far as the record shows) and without delivering a defence, to apply under O 25 r 4 of the Rules of the High Court 1957 and under the inherent jurisdiction of the High Court, for an order to strike out the statement of claim on the grounds that: (a) it disclosed no cause of action; (b) it was frivolous and vexatious and an abuse of the process of the court; and (c) the claim was statute-barred.

Ronex was followed by Abdul Malek Ahmad J (as he then was) in *Yeo Chu Hui v Lim Cheng Jin & Anor* [1993] 1 AMR 745 and Idris Yusoff J in *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83. Accordingly, it is my view that the course adopted by the defendant to strike out the action is wrong in law. In the upshot, I allow the appeal. I further order that each party is to bear his own costs both here and in the proceeding before the SAR.

Appeal allowed.

Reported by Lew Chee Seong